Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 28, 1997

Ms. Mary D. Marquez
Assistant to Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR97-2389

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 109564.

The Capital Metropolitan Transportation Authority (the "authority") received two requests for the technical and cost proposals submitted to the authority regarding the Automated Trip Planning system RFP No. CMTL-23537. You assert that the requested information is excepted from required public disclosure based on section 552.110 of the Government Code.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified the five vendors about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to commit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The vendors are Megadyne Information Systems ("Megadyne"), HyperPanel, Inc. ("HyperPanel"), Trapeze Software Group ("Trapeze"), MultiSystems, and ManTech Systems Engineering Corporation ("MSSC").[1] All five vendors responded to the notice and argue that their respective proposals are excepted from disclosure by section 552.110 of the Government Code.

[1]Tidewater Consultants, Inc. ("TCI") was acquired by ManTech Systems Engineering Corporation which has resulted in the name change from Tidewater Consultants, Inc. to ManTech Systems Solutions Corp. ("MSSC").

Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), which holds a "trade secret" to be

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria are used to determine if information constitutes a trade secret:

> (1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

Id.; see also Open Records Decision No. 522 (1989). However this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983).

As to the second prong of section 552.110, a governmental body must show substantial competitive harm for the information to be withheld. A "mere conclusory assertion of a possibility of commercial harm" is insufficient to show the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." MSSC has not provided sufficient facts to show how to establish that the information constitutes a trade secret. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). However, MSSC indicates that its competitor, Trapeze, is presently bidding against MSSC in Harris County and in Minnesota, thus illustrating that MSSC actually faces competition from Trapeze and that substantial competitive harm would result from disclosure of MSSC pricing information. Consequently, although we conclude that MSSC cannot withhold the entire proposal under the commercial or financial information prong of section 552.110, it may withhold "Section 4, Price" under the commercial or financial aspect of section 552.110.

We next review the arguments of HyperPanel and Trapeze and examine their documents. HyperPanel and Trapeze have not provided sufficient facts to establish either prong of section 552.110. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Consequently, the HyperPanel and Trapeze proposals may not be withheld under section 552.110 and must be released.

Multisystems has not provided sufficient facts to establish that the proposal is excepted in its entirety under either prong of section 552.110. Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). However, we have marked the portion of the Multisystems proposal which reveals the price breakdown of hardware, software and other services, which MultiSystem showed to be protected under section 552.110, but you must release the remaining portions.

Megadyne argues that the proposal in its entirety is excepted from disclosure as a trade secret. Additionally, it argues that the entire proposal must be withheld under the test articulated in *Critical Mass* for the commercial or financial information prong of section 552.110. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579 (1992). *Critical Mass* held

that commercial or financial information that is voluntarily provided to a governmental body by a third party is confidential when the information is the kind that would not customarily be released to the public by the third party. *Id.* at 879. It is our understanding that Megadyne is required to provide the authority with the type of information contained within the proposal in submitting it for consideration. The type of information submitted in its entirety appears to be a requirement in the bidding process for the serious consideration of its proposal, not a voluntary submission. *Critical Mass* is, thus, inapplicable to the proposal in its entirety. Open Records Decision Nos. 639 (1996) at 4 n.2, 494 (1988) at 5.

However, we find that Megadyne has met its burden under section 552.110 for the marked portions of the Paris Database Description, Volume 1 of the Automated Trip Planning System, and Volume 2 of the Paris Users Manual. *Cf.* Open Records Decision No. 319 (1982). The marked portions must be withheld. The remaining information is not protected.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 109564

Enclosures: Submitted documents

cc: Mr. Dean Richardson
Trapeze Software Group
3841 Mt. Carmel Road
Cincinnati, Ohio 45244
(w/o enclosures)

Ms. Andrea T. Overton
Tidewater Consultants
160 Newton Road
Virginia Beach, Virginia 23462
(w/o enclosures)

Mr. Kurt Dossin
Multisystems
10 Fawcett Street
Cambridge, Massachusetts 02138-1110
(w/o enclosures)

Mr. Michael Figueras
HyperPanel
6133 Bristol Parkway, Suite 278
Culver City, California 90230
(w/o enclosures)

Mr. Fred Simmons
Megadyne Information Systems
2800 28th Street, Suite 205
Santa Monica, California 90405
(w/o enclosures)